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BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of)
GTE CORPORATION,)
Transferor,)
and)
BELL ATLANTIC CORPORATION,)
Transferee)
for Consent to Transfer Control)

CC Docket No. 98-184

PETITION TO PROCESS BELL ATLANTIC-GTE REQUEST FOR RELIEF
AS A MAJOR AMENDMENT
TO APPLICATION AND FOR ISSUANCE OF FURTHER PUBLIC NOTICE

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Sprint Communications Company L.P. ("Sprint"), by its attorneys and pursuant to Section 309(b) and (c) of the Communications Act as amended, and Section 1.744(c) of the Commission's Rules, hereby petitions the Commission to process the "Report of Bell Atlantic and GTE on Long distance Issues in Connection With Their Merger and Request for Limited Interim Relief," ("Request for Relief") as a major amendment to the above-referenced application ("Application"). The Request for Relief was submitted as an ex parte filing in the above-referenced docket on February 24, 1999. As a major amendment to the Application, the Request for Relief should be subject to a further Public Notice with the statutory 30-day period for

submission of further petitions to deny or comments. Once the procedural defects have been cured, and the Applicants' actual propositions are fully disclosed and aired, it will become plain that both the amendment and the underlying application rest upon a legal impossibility and must therefore be dismissed.

I. INTRODUCTION AND SUMMARY.

The Request for Relief is a substantial modification of the Application that should be processed as a major amendment under Section 309(b) and (c) of the Communications Act and Section 63.52(b) of the Commission's rules, which require that such amendments be placed on Public Notice and 30 days provided for the submission of petitions to deny. In their initial Application, Bell Atlantic and GTE barely addressed the requirements of Section 271. They offered up a vague reference to Bell Atlantic's "hope" that it would have applied for and received any necessary 271 authority prior to the closing of the transaction, or that the Applicants would seek any necessary "transitional" relief if the FCC had not granted Section 271 authority by that time.¹ Similarly, in their reply to petitions to deny and comments filed in this proceeding, the Applicants alleged that Bell Atlantic would be able to meet the Section 271 requirements in the "vast majority" of Bell Atlantic's states prior to the consummation of the proposed merger.² Allowing only

¹ See Application at 19, n.14.

² Joint Reply of Bell Atlantic Corp. and GTE Corp. to Petitions to Deny and Comments, File No. 98-184, at 15 (filed Dec. 23, 1998) ("Joint Reply").

briefly for the "possibility" that Bell Atlantic would not have received Section 271 authority "in one or more" of its states, the Applicants stated that Bell Atlantic "may request limited interim relief" for the Commission to modify LATA boundaries.³ Neither the Application nor the Reply requested any action by the Commission. Thus, the Request for Relief seeks, *for the first time*, an "interim" waiver or forbearance from application of Section 271 to the merged entity as well as the modification of LATA boundaries crossed by GTE's Internet backbone network into a single, worldwide LATA. This request is a fundamental alteration of the Application as presently on file with the Commission, and it must be processed as a major amendment. It further reveals that the Application itself cannot be granted as a matter of law.

With the Request for Relief, the Applicants have, in fact, sought waiver of one of the "cornerstone" provisions of the Telecommunications Act of 1996.⁴ Congress correctly foresaw that the RBOCs cannot be successfully compelled to release their persisting and pervasive control over the local telephone bottleneck; rather, the RBOCs must be given the necessary incentive to affirmatively cooperate with the creation of competition that will, over time, reduce their control over the

³ Id. at 16.

⁴ Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Dkt. No. 98-147, *Memorandum Opinion and Order and Notice of Proposed Rulemaking* ¶ 73 (rel. Aug. 7, 1998).

local bottleneck. By predicating RBOC authority to provide interLATA services upon opening their local markets to competition, Congress provided the necessary economic incentive.⁵ Enforcement of Section 271 in accordance with its terms is the best (and perhaps only) hope for creating a competitive market for the provision of local telephone service as envisioned by the 1996 Act. By seeking any alteration to the enforcement of Section 271, the Applicants have substantially altered the issues presented by the instant Application. Indeed, the Application is now a direct assault upon one of the core provisions of the 1996 Act.

For the reasons described below, the Commission lacks statutory authority to grant the relief requested by the Applicants; to do so would eviscerate the underlying purpose of the provision. Nonetheless, as a substantial modification to the Application before the Commission that raises new issues for consideration, the Request for Relief must be placed on Public Notice with an opportunity for the submission of comments or additional petitions to deny. Parties who have not previously participated in the proceeding should be put on notice as to these new issues and given the opportunity to participate in the proceeding on a going forward basis. Additionally, since the Request for Relief implicates the factual premise of the underlying Application as originally filed, parties to the

⁵ See AT&T Corp v. Ameritech Corp., File Nos.E-98-41, 98-42, 98-43 (rel.Oct.7, 1998).

proceeding must be permitted to submit additional analyses based upon the Applicants' changed predicates. Precedent makes clear that interested parties are statutorily entitled to such a further opportunity to formally participate in this proceeding.

II. THE REQUEST FOR RELIEF MUST BE PROCESSED AS A MAJOR AMENDMENT TO THE APPLICATION AND PLACED ON PUBLIC NOTICE.

Section 309 of the Communications Act of 1934 provides that applications to transfer control of common carrier radio authorizations, as well as any major amendment to such an application, must be placed on Public Notice.⁶ The Public Notice must provide 30 days for parties potentially aggrieved by such an application to file petitions to deny the application. While the Applicants do not purport to formally amend the Application, the Request for Relief is a substantial modification of the Application that must be treated as a major amendment to the Application, whatever the Applicants choose to call it.

The Application sought consent to the transfer of control on the basis that the merged entity would be in compliance with Section 271 at the time the merger closed. The Application did not request relief of *any kind* from Section 271. The Request for Relief seeks, for the first time, a set of "interim" waivers with a matrix of conditions: an "interim" waiver of Section 271 to allow time to transition GTE's then-illegal "traditional voice" interLATA services in Bell Atlantic's region to other carriers,

⁶ See also 47 C.F.R. § 63.52(b).

and the creation of a single LATA, notwithstanding the failure to comply with Section 271, for GTE Internetworking. The latter relief would "take effect once Bell Atlantic obtains long distance authority covering at least one-quarter of its lines" although no discussion is offered as to what might happen if Section 271 authority covering this percentage of lines has not been obtained. Further, the "temporary" LATA "modification" is sought for a period of two years "unless extended for good cause." The safeguards of Section 272 are offered even though the claimed LATA modification would, according to the hypertechnical construction advocated by the parties, dispel the application of that section.⁷

In these circumstances, precedent makes clear that the statute mandates a further Public Notice in order to give potentially interested parties opportunity to participate in the Commission's consideration of these issues. Specifically, in Washington Assoc. for Television and Children v. FCC, 665 F.2d 1264, 1271 (D.C. Cir. 1981), the court held that an amendment "designed to improve the applicant's public interest showing as a justification for a waiver" and that had "decisional significance" must be treated as a major amendment under Section 309(b) and(c). Here, the Request for Relief is not only designed to "improve" the Applicants' public interest justification, it is the first time the Applicants' have sought to demonstrate their

⁷ Other apparent statutory obligations, such as the non-discrimination obligations of Section 251 (g) are not even mentioned.

legal qualifications (in relevant part) through a request for waiver of Section 271. Indeed, by implication, the parties have now admitted that absent the relief, they are legally disqualified from acquiring the assets. The Applicants' waiver request has self-evident decisional significance.

It is important to note that the Public Notice requirement codified in Section 309 accords interested parties notice of relief sought by the Applicants and provides an opportunity for them to participate formally in the proceeding. Absent the filing of a timely petition to deny, such entities lack standing before the Commission and their views need only be heard at the Commission's discretion. Further, only parties that file petitions to deny and thereby achieve party status in a proceeding may participate as parties in any subsequent hearing on the Application.

The Applicants did not seek relief from Section 271 in the Application, instead they contended that the merged entity would be in compliance with Section 271 at the time the merger closed. Parties that may have been interested in this proceeding only from the perspective of compliance with Section 271 are entitled to rely on their review of the Application as made available pursuant to the Commission's Public Notice in determining whether their participation was warranted.⁸ Such parties should be free

⁸ The existence of such parties is far from speculative. Any State Public Service Commission, consumer group, CLEC or IXC, among others, would be interested in defending Section 271 from RBOC attempts at circumvention such as that reflected in the Request for Relief.

to accept the representations of the Applicants in the Application and should not be compelled to participate in the proceeding merely to ensure their opportunity to participate formally at a later date should the Applicants change the basis upon which they seek Commission approval.

Further, the relief requested casts the underlying application itself in a very different light. The original application assured the public that Bell Atlantic would have full Section 271 authority at closing. It sought to assuage concerns regarding anticompetitive potential on the basis that the Applicants had already opened their local markets to competition, so much so that Section 271 authority throughout the Bell Atlantic region was imminent. It appears now that the Applicants are willing to bet that only New York authority will have been received at closing. Not only does this change in position dictate legal difficulties under Section 271, it requires reexamination of a fundamental premise of the Application's effort at a public interest showing *in toto*.

Providing meaningful notice and opportunity to participate is the gravamen of Section 309; such notice and opportunity will be denied unless a further Public Notice is issued. The statute mandates issuance of a further Public Notice here.⁹

⁹ The Commission should not be put off by claims that issuance of such a notice will delay the proceeding. Failure to issue a further Public Notice is more likely to occasion delay as it will provide a basis for a successful stay, appeal and remand of the proceeding to allow aggrieved potential parties their statutory opportunity to participate in this proceeding. Moreover, the Public Notice and resulting pleading cycle will be

III. THE RELIEF REQUESTED BY THE APPLICANTS IS CONTRARY TO THE LAW.

The Applicants make numerous factual assertions as well as legal and policy arguments in the Request for Relief. Sprint does not undertake here to respond completely to these arguments as further review and analysis is necessary for a complete response. Rather, Sprint simply points out here that the relief requested by the Applicants is a statutory non-starter and should be rejected on that basis alone. As discussed below, the FCC cannot waive Section 271, nor can it reach the equivalent result through LATA modifications.

A. The Commission Has No Authority To Grant A Temporary Waiver Of Section 271.

The Applicants request a waiver of Section 271 for 90 days following the closing of the merger to allow existing GTE long distance customers to transition to another carrier. Prescinding from the substantial customer disruption this proposal would cause (no doubt explaining to these customers that it was the FCC's "fault"), the Commission simply does not have authority to waive Section 271 -- permanently or temporarily. There is no waiver provision in Section 271, and the forbearance section in the Communications Act -- Section 10 -- expressly prohibits the Commission from forbearing from Section 271.¹⁰ Section 10 of the Act, granting the FCC authority to forbear from regulating carriers, explicitly prohibits the FCC from forbearing from

easily completed well within the Applicants' proposed time frame for Commission action.

¹⁰ See 47 U.S.C. § 160(d).

Sections 251(c) and 271 until those requirements have been fully implemented.¹¹

The removal of the statutory impediment to provision of interLATA service is entirely within the control of the RBOCs -- once they comply with Section 271 and sufficiently open their networks to competition, they may provide interLATA service. Relief from the requirements of Section 271 is an all-or-nothing proposition; there is one statutory avenue for relief from this provision -- compliance with the checklist.

Moreover, while the Commission may have temporarily relieved parties from complying with statutory cross-ownership provisions in certain other cases,¹² the statutory provisions waived in those cases are very different from Section 271 and do not support the argument that the Commission may temporarily waive Section 271.

¹¹ See Petition for Declaratory Ruling Regarding U S West Petitions to Consolidate LATAs in Minnesota and Arizona, 12 FCC Rcd. 4738, 4751 ("The Act expressly prohibits the Commission from abstaining in any way from applying the requirements of Section 271 until those requirements have been fully implemented"); Southwestern Bell Telephone Co. Petition for Limited Modification of LATA Boundaries, 1998 FCC LEXIS 2342, ¶ 5 (rel. May, 1998) ("While the Commission may forbear from applying certain provisions of the Act, the Commission may not forbear from the requirements of Section 271").

¹² See Request for Relief at 3, n.2, citing Golden West Associates, L.P., 55 Rad. Reg. 2d (P&F) 125 (1985); WWOR-TV, Inc., 6 FCC Rcd 193 (1990); Cablevision VI, Inc., 5 FCC Rcd 7166 (1990). The WWOR case is simply irrelevant to whether Section 271 can be waived on a temporary basis, as the Commission may waive Section 310(b)(4) (at issue in that case) if it decides that the public interest would be served by such waiver.

The Request for Relief relies upon Golden West Associates, where the FCC granted a temporary waiver of the statutory broadcast station-cable television systems cross-ownership prohibition.¹³ Contrary to the Request for Relief, the facts of Golden West Associates are readily distinguished from the Section 271 context.

In Golden West Associates, the Commission found that Congress intended to codify the Commission's pre-existing cross-ownership rule, a rule from which the Commission had routinely granted waivers on a temporary basis. The FCC reasoned that, since Congress had codified a Commission rule, it also intended to adopt the Commission's previous interpretations of its rule, including the Commission's allowances for temporary waivers of the rule. However, when Congress enacted Section 271, it was not codifying a Commission rule that had previous administrative interpretations. Rather, Congress was setting forth new requirements, never before interpreted by the Commission. Section 10 -- prohibiting forbearance unqualifiedly -- makes legislative intent crystal clear.¹⁴

¹³ The Cablevision VI decision, also cited by the Applicants, merely discussed the applicability of the decision in Golden West Associates to a request for permanent waiver of the statutory cable/television cross-ownership prohibition (the request was denied).

¹⁴ Indeed, as the Request for Relief acknowledges, the relevant historical analog lies in the Modified Final Judgment's line-of-business restriction, from which no analogous temporary waiver of this core restriction for landline voice and data services was ever allowed.

Further, the policies behind the cross-ownership restriction in Golden West, on the one hand, and Section 271 on the other, require different conclusions on the issue of waivers. Through the enactment of Section 271, Congress intended that BOCs would have an *immediate and continuous* incentive to cooperate with competitors in order to offer long distance services within their regions. Any disruption of this incentive is harmful. On the other hand, the cross-ownership provision in Golden West was intended to prohibit firms from obtaining ownership interests that would increase their horizontal concentration and thereby alter their long-term incentive structure for the worse. If a prohibited cross-interest is permitted for a short time to allow for divestiture, it is unlikely to alter the incentive structure of the entity with the prohibited cross-interest.

Consistent with this reasoning, the parties in *SBC-SNET*¹⁵ fully divested SNET's long distance businesses within SBC's service areas prior to obtaining FCC approval for the merger. This divestiture was a prominent factor in the FCC's decision, and FCC approval was explicitly conditioned upon

Applicants' complete and continued fulfillment of the measures described above that are designed to ensure that this merger does not result in SBC providing interLATA services in its current region in violation of Section 271 of the Communications Act. . . .¹⁶

¹⁵ Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Southern New England Telecommunications Corp., Transferor to SBC Communications, Inc., CC Dkt. No. 98-25, *Memorandum Opinion and Order* (rel. Oct. 23, 1998) ("*SBC-SNET*").

¹⁶ Id. ¶ 51.

This conditioned approval was given only after the Commission had been assured of complete divestiture, including: 1) evidence that all of SNET's customers within SBC's territory had been moved to a lawful interexchange carrier of their choice; 2) no current or future compensation would transfer between SNET and the new interexchange carrier; 3) all of SNET's state certificates to provide service in those states had been rescinded by the relevant public utility commissions; 4) all related tariffs had been canceled; and 5) the provision of service by SNET pursuant to calling cards and pre-paid cards had been brought into compliance with Section 271's in-region proscriptions.¹⁷

For these reasons, the statutory provision temporarily waived in Golden West is very different from Section 271 and cannot be used to support Bell Atlantic/GTE's argument that the Commission has the authority to temporarily waive Section 271.

B. The Commission Cannot Lawfully "Modify" LATA Boundaries In The Manner Suggested By The Applicants.

The Applicant's request to "modify" Bell Atlantic's LATA boundaries for the GTE Internetworking service is plainly contrary to the statute and would eviscerate the intent of the statute. First, the suggestion that Internet services such as those provided by GTE Internetworking are on the "periphery" of Section 271 and outside the concern addressed by Congress in

¹⁷ Id. ¶ 37.

Section 271¹⁸ is specious. Congress clearly understood the import of the Section 271 interLATA restriction with respect to the Internet. For purposes of Section 271, Congress did not differentiate between POTS and advanced services, or between circuit switched and packet switched services, or between fiber-optic technologies and copper twisted pair, despite the fact that all of these services and technologies were known in and prior to February of 1996. Congress drew a deliberate line between prohibited activities and exempted ones; indeed, Congress included as an exempted "incidental interLATA service" the provision of Internet services only where they are provided over dedicated facilities to and from elementary and secondary schools.¹⁹ Indeed, as explained below, the Commission has already rejected the proposition that Section 271 can in any way be read to allow RBOC provisioning of advanced packet switched services prior to grant of a 271 application.

Nonetheless, the Applicants request that the Commission "modify" Bell Atlantic's LATAs so that Bell Atlantic would have only one LATA worldwide for the GTE Internetworking service, so long as Bell Atlantic first obtains Section 271 approval for 25 percent of its access lines.²⁰ However, the parties essentially

¹⁸ See Request for Relief at 6-7.

¹⁹ See 47 U.S.C. § 271(g)(2). Further, the section commands that these exceptions be construed narrowly. § 271(h).

²⁰ We are once again left to our imaginations as to what happens if such authority has not been earned at the time of closing.

are asking for forbearance or waiver of Section 271, and this unalterable reality has been fully appreciated by the Commission. Both the Common Carrier Bureau and the Commission have decided that LATA modifications may not be used to evade the strictures of Section 271. Accordingly, the underlying policy of the matter not having changed, there is no basis for reversing these decisions. Thus, the Applicant's request to "modify" Bell Atlantic's LATAs should be denied.

Both the Common Carrier Bureau and Commission have found that Section 10 limits the manner in which the Commission may exercise its authority to modify LATA boundaries. In Advanced Telecommunications, the Commission concluded that large-scale changes in LATA boundaries for packet-switched services would effectively eliminate LATA boundaries for such services and "circumvent the procompetitive incentives for opening the local market to competition that Congress sought to achieve in enacting section 271 of the Act."²¹ In that case, several RBOCs sought modifications to their LATA boundaries to create one "largescale LATA" for packet-switched services. The Commission found that such a request for LATA modifications were "functionally no

²¹ Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Dkt. No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking, at ¶ 81-82 (rel. Aug. 7, 1998). The Commission cited the Supreme Court's holding in MCI v. AT&T, that the Commission's authority to "'modify' portions of the Communications Act means 'moderate change' and not 'basic and fundamental changes in the scheme created by [the section at issue]'" Id. (citing MCI Telecommunications Corp. v. AT&T, 512 US. 218 (1994)).

different than petitioners' requests that we forbear from applying section 271 to their provision of these services."²²

In U S West, the Common Carrier Bureau considered whether the Commission had delegated its exclusive authority under Section 3(25) of the Communications Act to the States to establish or modify LATAs.²³ U S West sought to collapse its intrastate LATA boundaries to make both Arizona and Minnesota single LATA States.²⁴ The Bureau held that the Commission had not delegated to the States its exclusive authority to modify LATAs and that if U S West had requested the Commission to modify its LATA boundaries so that each State has only one LATA "the restrictions of Section 10(d) would have prohibited the Commission from granting the request until such time as US West had entirely satisfied the requirements of Section 271."²⁵ The Bureau found that "[t]he Act expressly prohibits the Commission from abstaining in any way from applying the requirements of Section 271 until those requirements have been fully implemented."²⁶

The Commission does not have the authority to grant the LATA modification sought by the Applicants because, in fact, the

²² Id. at ¶ 82.

²³ In re Petition for Declaratory Ruling Regarding US West Petitions to Consolidate LATAs in Minnesota and Arizona, Order, 12 FCC Rcd 4738 (CCB 1997) ("US West").

²⁴ Id. at 4740.

²⁵ Id. at 4751.

²⁶ Id.

relief sought is not a "modification" of LATA boundaries. Rather, the Applicants have now requested the Commission to materially eliminate their obligations under Section 271 by eliminating all LATA boundaries. Precedent makes clear that the Commission cannot "modify" a statutory requirement out of existence, even where the right to "modify" the statutory obligation is present in the statutory provision in question.

Section 3(25) defines a LATA as areas "established or modified by a Bell operating company . . . and approved by the Commission."²⁷ The Commission has found that Section 3(25)(B) provides that RBOCs may modify LATA boundaries for limited purposes, if such modifications are approved by the Commission.²⁸ For example, the requests in Limited Modification of LATA Boundaries involved limited areas and only a small number of customers or access lines.²⁹ In that case, the Commission found that due to the limited amount of traffic and the type of service involved, "the proposed modifications [would] not have a significant anticompetitive effect on the interexchange market or

²⁷ 47 U.S.C. § 153(25)(B).

²⁸ See In re Petitions for Limited Modification of LATA Boundaries to Provide Expanded Local Calling Service, Memorandum Opinion and Order, 12 FCC Rcd 10646, 10651, 10654 (1997) (The Commission granted limited LATA boundary modifications to permit several RBOCs to offer expanded local calling service.) ("Limited Modification of LATA Boundaries").

²⁹ Id. at 10655.

on the BOCs' incentive to open their own markets to competition."³⁰

Contrary to the requests made in Limited Modification of LATA Boundaries, Bell Atlantic and GTE do not seek a minor change to Bell Atlantic's LATA boundaries. Rather, they seek the evisceration of LATA boundaries for GTE's Internetworking services, and the concomitant extirpation of Bell Atlantic's Section 271 obligation. This is not a "modification". In MCI v. AT&T, the Supreme Court held that the word "modify" means moderate change and does not denote fundamental change.³¹ Clearly, by requesting elimination of in-state LATA boundaries, the parties are seeking fundamental change, not a modification. The statute only grants the Commission authority to establish LATAs and to modify LATAs, not authority to wholly eliminate LATA boundaries, as the parties propose. Indeed, this is particularly true since the parties' request would eviscerate Section 271 and its purposes.³²

³⁰ Id.

³¹ MCI Telecommunications Corp. v. AT&T, 512 U.S. 218, [] (1994).

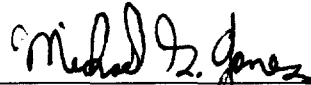
³² The Applicants additionally assert that some of the GTE services fall outside of the interLATA proscription because they either are not properly considered interLATA services (because they are information services and somehow Bell Atlantic and GTE think that information services cannot also be interLATA services, notwithstanding the plain language of Sections 271 and 272) or they are "incidental interLATA services" exempt under Section 271. This remarkably abrupt and cryptic treatment of these additional issues is insufficient to permit a reasoned analysis by the FCC (nevertheless a basis for relief) and simply underscores the need for further proceedings here.

CONCLUSION

The Request for Relief seeks a waiver of Section 271, "one of the cornerstone provisions" of Congress' effort to create competition in the provision of local telephone service. Because the original Application sought no such relief -- to the contrary, it sought to assure the FCC of full 271 compliance -- the Request for Relief is a substantial modification of the Application and must be processed as a major amendment in accordance with the requirements of Section 309(b) and (c). In these circumstances, the Communications Act mandates that the Request for Relief be placed on Public Notice with the requisite 30 day time period in which interested parties may submit additional petitions to deny. Interested parties must also be allowed to submit additional analyses of the proposed transfer as now revised. Such analysis on Sprint's part will include such issues as the anticompetitive implications of a transaction that

would allow local monopolies not in compliance with Section 271 to merge, especially under conditions that would allow for the immediate internalization of spillover effects.

Respectfully submitted,



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March 12, 1999

CERTIFICATE OF SERVICE

I, Dennette Manson, do hereby certify that on this 12th day of March, 1999, copies of the "Petition To Process Bell Atlantic-GTE Request For Relief As A Major Amendment To Application And For Issuance Of Further Public Notice" were served by first class mail, postage prepaid, or hand delivered as indicated, on the following parties:

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